

for The Defense

Volume 5, Issue 10 ~ ~ October 1995

The Training Newsletter for the Maricopa County Public Defender's Office ~ Dean Trebesch, Maricopa County Public Defender

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Forensics Today

By David C. Moller, Sr., Lead Investigator

Recently one of our attorneys was successful in the cross-examination of a new fingerprint technician, which prevented the technician from qualifying as an expert witness in superior court. The attorney had taken some time to review with me some basic questions that the technician should have been able to answer, thereby avoiding the pitfall of assuming that a witness who has

been listed as an expert is knowledgeable and qualified to be an expert.

Over the next few months I will write articles on various areas relating to fingerprints which you may want to use in future interviews or cross-examinations.

In discussing fingerprints, you will often hear the terms "fingerprint classifications," "fingerprint patterns," and "individual points of identification." Following is an explanation of the differences.

Fingerprint Patterns


If you look at the inner surfaces of your fingers, palms, and soles of your feet, you will notice the elevated, minute, ridge details which form several different patterns. The ridge details on the fingers are broken down into three major pattern categories. These are "loops," "whorls," and "arches." What is important to remember is the frequency with which they occur. For example, the loop pattern comprises 65% of all fingerprints, the whorl pattern about 30%, and the arch pattern only about 5%.

[See fingerprint examples on pages 3 and 4.]

Fingerprint Classification

An examiner uses the fingerprint patterns and the sequence in which they occur to prepare a formula to break down the patterns into subgroups. This is necessary in order to be able to take the inked fingerprint cards and place them into a filing sequence for storage or retrieval. This is done based upon the classification the prints received.

An important fact to remember is that fingerprint classification and fingerprint identification are two different concepts. Classification deals mostly with the filing of the fingerprint cards. Fingerprint identification is the actual matching of one fingerprint to another by using the points of identification. A fingerprint examiner may have many years of experience as a fingerprint

(cont. on pg. 2) 



classifier, but little or no training in identification. Thus, he may be an expert in one category and not in the other.

Individual Points of Identification

An examiner who wants to match two prints to each other must use the fingerprint points of identification. These points are found within the pattern's ridge details. A point may consist of some of the following: a bifurcation (when two ending ridges combine to form a fork), short ridge, ending ridge, enclosure (where ridges meet to form bifurcations on each end), dots, trifurcation, etc. Some of these points occur more frequently than others. (Example: short ridges, bifurcations, and ending ridges are far more frequent than trifurcation, dots, and enclosures.) An examiner must be able to recognize these details and articulate the frequency with which they occur.

When a technician is comparing one fingerprint to another, the same points of identification must be present in both prints. Additionally, the points must be found in the same relative position on each of the fingerprints. They must have the same number of ridges intervening between points in order for them to match. No points of identification can be dissimilar unless they can be explained. An example of a dissimilarity would be if a ridge ends on one print but touches in another, creating a bifurcation. The explanation may be that in this case some dirt or dust may have prevented the continuation of the first print's ridge to complete or to become the bifurcation in the second print.

A fingerprint contains, on the average, 75-175 points. There is no set or required number of points necessary to make a positive identification between two

prints. The examiner has to base his findings upon several factors: quality of the print, uniqueness of the pattern, and points of identification (example: arch pattern over loop; dots over ending ridge). Another factor is the training and experience of the examiner. The courts do not require a set number of points for a positive match. It does not hurt to ask an examiner if he sets a minimum number for himself in order to satisfy his conscience that the prints do positively match.

If an expert says there are nine points of identification, mathematicians state that the odds of more than one person on the earth sharing those nine points are one in 1,953,125,000,000,000 -- a number greater than a million times the human population.

Next month I will talk about how fingerprints are lifted and how long they last.

Editor's Note: David C. Moller, Sr. is an expert on fingerprint identification and processing, and has testified numerous times as an expert witness in Arizona and New Jersey. **Ω**

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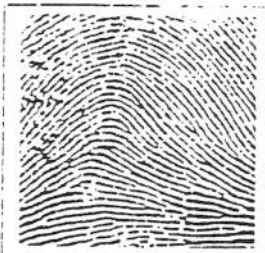
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for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

MCPD Training Schedule

Nov 06:	"Kids & Drugs II" 8:00 a.m. - 4:00 p.m. Arizona State University
Nov 06-24:	New Attorney Training MCPD Training Facility
Nov 13-16:	New Support Staff Training MCPD Training Facility
Dec 08:	"Intermediate Sanctions in Maricopa County" 2:00 - 4:00 p.m. MCPD Training Facility

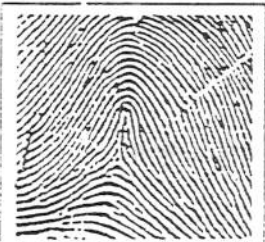




PLAIN ARCH



PLAIN WHORL



TENTED ARCH



CENTRAL POCKET LOOP



LOOP



DOUBLE LOOP



LOOP



ACCIDENTAL

Incompetence to Stand Trial--13-4501 et seq.

from Dr. Jack Potts,
Maricopa County Correctional Health Services

Senate Bill 1273 was passed last legislative session primarily to deal with the problem of permanently incompetent, mentally impaired offenders who are a continuing threat to public safety AND who are not civilly committable pursuant to 36-501 et seq.

The major changes affecting the trial court will be:

1. screening evaluations codified (A.R.S. §13-4503(C));
2. request (motion) MUST be in writing and state the facts upon which the motion is based (A.R.S. §13-4503(A));
3. ALL available medical and criminal records must be provided to the court within THREE DAYS of filing (A.R.S. §13-4503(B));
4. failure to provide relevant material may result in denial of motion;
5. nominations for experts must be included in motion;
6. misdemeanor charges may be dismissed if previous finding of incompetency (A.R.S. §13-4504);
7. pretrial motions may continue to be filed (A.R.S. §13-4502(B));

Once a motion is appropriately granted for "screening evaluation," the court IMMEDIATELY transfers the motion and records to the Forensic Services Unit while synchronously calling Kris Anderson at 506-2477. Three weeks should routinely be scheduled for receipt of screening evaluations for those in custody.

If a motion for Rule 11 is granted, then the court MUST THAT DAY have the motion, prescreen, and minute entry walked over to Mark Lloyd (506-1509) or Cathy Shamberger (506-2388) in Competency Calendar Offices (CCB-5). Giving these motions priority is ESSENTIAL as there are specific time limits that need to be enforced once the court determines a full competency evaluation is warranted.

A separate request for screening criminal culpability (insanity) may be made once the threshold question of competency is met. However, the parties must provide requested materials within ten working days of the request. (If there are any questions regarding this, please feel free to contact Dr. Jack Potts at 506-2092 or digital pager 340-2465.) Ω

Jail Visits & Telephone Interviews -- Changes

Beginning October 22, 1995, the Maricopa County jails will follow a new jail visitation schedule. Additionally, the telephone interview program has been reinstated. These changes resulted from recommendations made to the Sheriff's Office following a meeting with representatives of the criminal defense bar (i.e., Public Defender's Office, Legal Defender's Office, OCAC, and private defense counsel), the adult probation department and the interpreter's office of Maricopa County. The meeting was called to address problems with telephone appointments and jail interviews (including delays and sexual harassment).

In a recent memo to our office members, Jim Haas, Senior Deputy and one of our representatives at the meeting, noted that the new schedule does not change the visitation times at Estrella Jail and the "In-tents" unit--they will continue to operate on the same schedule as before. He also pointed out that if attorneys want to visit clients during open visitation, they may do so; the new schedule was designed ". . . to cut down on the competition to visit during the afternoons, when attorneys are most available to go."

[See copies of the new visitation schedule and telephone interview procedures on pages 6 - 8.] Ω

Probation Programs Summary

The Maricopa County Adult Probation Department recently created a concise, "user-friendly" reference of their current programs for probationers--including a brief description of each program, the eligibility criteria, the name of the screener for each program, and the telephone number. (This could be characterized as the "Cliff Notes" of Intermediate Sanctions in Maricopa County.) If additional information is needed, contact the program screener.

[See "Cliff Notes" on pages 9 - 11.] Ω



OFFICE OF THE SHERIFF

JOSEPH M. ARPAIO
SHERIFF



October 12, 1995

Mr. Dean Trebesch
Maricopa County Public
Defender
132 S. Central #6
Phoenix, AZ 85004

Dear Mr. Trebesch:

Effective October 22, 1995, the following visitation schedule will be accomplished in the Maricopa County Sheriff's Office jails.

Visiting hours for Sunday, Monday, Tuesday, Wednesday and Thursday:

8:00 AM to 1:00 PM - Open Visitation
1:00 PM to 5:00 PM - Privileged Visitation Only
5:00 PM to 8:00 PM - Open Visitation

Friday: 8:00 AM to 5:00 PM - Privileged Visitation Only

Saturday: There will be NO visitation

Please see attached copy of Madison Street Jail's visitation specifics.

ESTRELLA JAIL AND IN-TENTS UNIT:

Will maintain the same visitation schedule as they are currently using.

We hope that this revision in visitation hours will better accommodate your needs.

Sincerely,

Joseph M. Arpaio
Maricopa County Sheriff

Major Rick Wilson
by BGW

Major Rick Wilson
Assistant Bureau Commander
Custody Operations Bureau

JMA:RAW:BGW:mls

for The Defense

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VISITATION NOTICE

REVISED

SPECIAL MANAGEMENT INMATE VISITATION SCHEDULE

Effective October 22, 1995, VISITATION hours for the MADISON STREET JAIL will be changed to:

SUNDAY - THURSDAY

8:00 AM to 11:00 AM - OPEN (General Population)

1:00 PM to 5:00 PM - Privileged ONLY

5:00 PM to 9:00 PM - OPEN (General Population)

FRIDAY - Privileged Visits ONLY

SATURDAY - NO Visits

SPECIAL VISITS will be as follows:

ADMINISTRATIVE SEGREGATION AND FEMALE INMATES

SUNDAY

1:00 PM to 2:30 PM

6:30 PM to 8:00 PM

WEDNESDAY

11:00 AM to 12:00 PM

6:30 PM to 8:00 PM

NOTE: Sign-up for these visits start 30 minutes prior to each visitation session (60 minutes on Sunday afternoon). Two 30 minute visits are allowed during this time period, if available.

JUVENILE INMATES

SUNDAY

11:00 AM to 12:30 PM

WEDNESDAY

12:00 PM to 1:00 PM

(ALL CELL BLOCKS)

NOTE: Sign-up for these visits start at 11:30 am (10:00 on Sunday). Two 30 minute visits are allowed during this time period, if available.

CELL BLOCKS 6-1D & 6-4B	5:00 PM to 5:30 PM
CELL BLOCK 6-1A & 6-4C	5:30 PM to 6:00 PM
CELL BLOCK 6-4A	6:00 PM to 6:30 PM
CELL BLOCK 6-1B & 6-1C	6:30 PM to 7:00 PM

NOTE: Sign-up for these visits start 15 minutes prior to each visitation session. All visits will be limited to 30 minutes. No one can sign up for a visit after the visitation session starts.

CLOSE CUSTODY INMATES

MONDAYS and THURSDAYS

12:00 PM TO 1:00 PM (ALL CELL BLOCKS)

NOTE: Sign-up for these visits start at 11:30 AM. Two 30 minute visits are allowed during this time period, if available.

5:00 PM TO 5:30 PM (ALL CELL BLOCKS)

CELL BLOCKS 6-2A & 6-2D	6:00 PM to 6:30 PM
CELL BLOCKS 6-2B & 6-2C	7:00 PM to 7:30 PM
CELL BLOCK 5-3C & 5-3D	8:00 PM to 8:30 PM

NOTE: Sign-up for these visits start 15 minutes prior to each visitation session. All visits will be limited to 30 minutes. No one can sign up for a visit after the visitation session starts.

INMATES WILL BE RESPONSIBLE FOR ADVISING THEIR VISITORS AS TO WHEN THEY CAN HAVE VISITS. VISITORS THAT REQUEST A VISIT AT OTHER THAN THE TIMES AND DAYS SPECIFIED WILL BE NOT BE ALLOWED TO VISIT.



OFFICE OF THE SHERIFF

JOSEPH M. ARPAIO
SHERIFF



MEMORANDUM

DATE: October 6, 1995

TO: Dean Trebesch
Public Defender

FROM: Major Richard A. Wilson
Assistant Commander
Custody Operations Bureau

SUBJECT: LEGAL TELEPHONE CALLS FOR INMATES

OCT 13 AM 9:42
MARICOPA COUNTY
SHERIFF'S OFFICE

This memorandum is in reference to our recent meeting regarding legal telephone calls for inmates within the Maricopa County Sheriff's Office jail system.

As agreed upon, the Appointed Counsel may fax their requests for inmate calls, to the respective facilities, no later than 0900 hours each morning.

Custody staff will distribute the requests to the inmates so that the inmates are accommodated with afternoon phone calls accordingly.

Please address only one inmate per fax, as the fax will be given directly to the inmate, notifying him to make the call. It is the responsibility of the inmate to complete the call.

Listed below are the fax numbers to be used in each of our jails:

MADISON STREET JAIL	(602) 379-0098
FIRST AVENUE JAIL	(602) 254-2769
DURANGO JAIL	(602) 278-0490
ESTRELLA JAIL	(602) 278-0965
TOWERS JAIL	(602) 278-2097



MARICOPA COUNTY ADULT PROBATION PROGRAMS

F.A.R.E.

SCREENER: Meri Romero 506-3239

DESCRIPTION: Financial Assessment Related to Employability. This is the least restrictive form of supervision.

FEE: Based on net daily income, # of dependents, and severity of crime.

CRITERIA: defendant is low risk
defendant is not in need of supervision and has low needs

I.P.S.

SCREENER: IPS Supervisor in area office

DESCRIPTION: Intensive Probation Supervision, increase supervision, whereby the next option for the defendant on the continuum is prison.

CRITERIA: if residential treatment, under 90 days
employable or full-time student
no long history of violent offenses which may endanger team
exceptions may occur on a case by case basis

SHOCK PROGRAM

SCREENER: Janet Blake 258-1148

(or IPS Supervisor)

DESCRIPTION: 120 day boot camp as a term of Intensive Probation for men and women ages 18-25.

CRITERIA: IPS eligible
no physical or mental impairments (does not include low I.Q.)
no previous prison sentences as an adult
no pending new charges or deportable by INS

AFTERSHOCK COMPONENT: Specialized IPS supervision which helps the Shoch graduate successfully transition from boot camp to the community. May include residence at the Aftershock Transitional Living Center.

Criteria: Successful graduation from Schick Incarceration, plus residence in the central corridor OR need for specialized supervision /residence at Transitional Living Center.

SCREENER: Contact Janet Blake 254-1148.

COMMUNITY PUNISHMENT PROGRAM

SCREENER: Mary Ann Boyden 506-7464

(for all components)

Drug/Alcohol Component: Intensive outpatient drug program, which can also be utilized as aftercare for defendants completing a residential program. CPP can only be added to terms at time of sentencing in this component.

CRITERIA: PSI Screenings:
defendant in need of outpatient treatment along w/2 of the following:
prior supervised probation grant
prior felony conviction
prior prison commitments

PV Screenings: defendant only needs to be in violation & need treatment

*Calvary: 30 day residential treatment component. **Criteria:** CPP term and eligible.

DRC YOUTHFUL OFFENDER PROGRAM

DESCRIPTION: Similar to the DRC. w/grant funded treatment and education which is geared to the young offender. Supervision by the DRC team continues beyond the jail release date for a maintenance phase.

FEE: hourly wage + \$2.00 per day (min. \$7.00/day)

CRITERIA: Same as DRC along w/the following
defendant must be 25 years or younger
no aggravated assaults class 3 felonies

Sex Offender Component: Officers need to prescreen all clients for CPP. Funding is available for treatment and testing through providers approved by the department. Financial need is not a requirement for acceptance. CPP can be added as a term at PSI, PV, or via modification. Officers must submit a CPP voucher for funding.

Mental Health Component: Includes the Transitional Living Center as well as funding for testing with approved providers.

CRITERIA: no mental retarded clients unless diagnosed mild MR w/a SMI diagnosis
no clients w/mental illness due to long-term substance abuse
no Arsonists, hands-on sex offenders, or long history of violence
no clients under 18 years of age

DRUG COURT

SCREENER: Julie Begona 506-8093

Nancy O'Brien 506-2993

DESCRIPTION: Team approach to first time felony drug offenders, w/a min. of 6 months in the drug court counseling program, along w/frequent court and team contact and drug testing. The defendant can earn an E.T. from probation.

FEE: \$16.00 per week (treatment cost)

CRITERIA: clients are only screened and accepted at the PSI level.

Eligible defendants are sentenced on drug possession or use offenses including paraphernalia. No sales offenses are eligible.

Only convictions of possession or use of illegal drugs

Standard probation eligible

Minimal substance use history

No prior felony drug offense

Maximum of one prior felony non-drug offense

Defendant is in need of drug education and substance abuse

outpatient counseling and drug monitoring

WORK FURLOUGH

DESCRIPTION: The defendant is released a maximum of 12 hours a day, 6 days per week to maintain employment. If DUI conviction, per statutes, only allowed 5 days per week. If no employment, given 10 working days to find a job.

FEE: hourly wage + \$2.00 per day (min. \$7.00/day).

CRITERIA: no history of escapes or present risk to escape

not awaiting residential drug treatment

no possible risk to harm or stalk victim if released

no violent offenses involving weapons

no pending new Superior Court charges or outstanding warrants

DAY REPORTING CENTER

DESCRIPTION: Available for defendant's last 60 days of jail unless immediately eligible (per terms). The defendant lives at home while working, attending treatment, completing community service hours, and reports to office daily. May continue past jail release date if deemed necessary.

FEE: hourly wage + \$2.00 per day (min. \$7.00/day).

CRITERIA: no sex offenders or prior sex offenses

no violent offenders or long history of violent offenses

not awaiting residential treatment

verifiable and appropriate residence

DRC YOUTHFUL OFFENDER PROGRAM

DESCRIPTION: Similar to DRC w/grant funded treatment and education which is geared to the young offender. Supervision by the DRC team continues beyond the jail release date for a maintenance phase.

FEE: hourly wage + \$2.00 per day (min. \$7.00/day)

CRITERIA: Same as DRC along w/the following:

defendant must be 25 years or younger

no aggravated assaults class 3 felonies.

FURLOUGH SCREENERS: **Main Jail, Durango, Towers, Estrella(A-E MALES)-Ed Lambert 506-7470
**Estrella Jail(F-Z MALES)-James Hanosh 506-6329
**ALL OUT OF CUSTODY and Madison-Susan Burch 461-4517
**ALL SPANISH SPEAKERS AND FEMALES AT ESTRELLA
ROB McAnally 461-4518

APPOINTMENTS FOR OUT OF CUSTODY: 506-3871-CCB
506-2555-SEF

S.T.E.P.

SCREENER: Court Liaisons

DESCRIPTION: Short Term Enhanced Probation. Same as DRC and the same criteria. The defendant is given a deferred 30-day jail term at time of sentencing and ordered to immediately report to the DRC office. If successfully completes DRC the jail term is modified off. If noncompliance the jail term may begin immediately. Available for standard probation only.

FRANK X. GORDON LEARNING CENTERS

DESCRIPTION: A learning program to assist probationers in improving their reading or math skills as well as earn their GED. Probationer begins program by signing up during the listed registration times.

MESA: 245 N. Centennial Way RM 106 Contact: Erin Halk 461-4501

Registration: Tue. 9am or Tue. 5pm

S. PHOENIX: 1022 E. Garfield Ave. Contact: Kerry Lemerise 254-1051

Registration: Thur. 11am or Thur. 5pm

GLENDALE: 6655 W. Glendale Ave. Contact: Lindell Rhodes 435-6711

Registration: Tue. 1pm or Tue. 6pm

0372Q

Arizona Advance Reports

Volume 197

Andrade v. Superior Court, 197 Ariz. Adv. Rep. 6 (1995)

Trial Judge Alfred J. Rogers
Relief Denied

The state charged the defendant with three counts of aggravated assault against three separate victims. At trial, the judge instructed the jury on the lesser included offenses of attempted aggravated assault and disorderly conduct.

The jury acquitted the defendant of aggravated assault on all three counts, and also acquitted on attempted aggravated assault and disorderly conduct on the third count. The jury deadlocked on the lesser included offenses in counts one and two, and a mistrial was declared as to the lesser included offenses.

The state then began proceedings on the lesser included offenses. The defendant moved to dismiss on double jeopardy grounds. The trial court denied relief, and the defendant was granted review by special action.

The court held that the acquittals on the aggravated assault charges and the mistrial on the lesser included offenses of attempted aggravated and disorderly conduct do not bar a retrial on the lesser included offenses. Once jeopardy attaches, it terminates when a defendant is acquitted. When a jury is instructed on lesser included offenses, those offenses should be treated as if they had been specified in separate counts of the indictment. Jeopardy therefore did not terminate because the jury was unable to reach a verdict on the lesser included offenses.

The court noted that its holding does **not** preclude a defendant from challenging a retrial based on the theory of collateral estoppel.

State v. Rodgers, 197 Ariz. Adv. Rep. 8 (1995)
Trial Judge Gregory H. Martin
Affirmed

The defendant was convicted at a bench trial of leaving the scene of an injury accident, in violation of A.R.S. §28-661. Defendant contended on appeal that because the victim was injured when she **intentionally** jumped from his car, there was no "accident" within the meaning of the statute.

The court of appeals disagreed, broadly defining "accident" as including "any vehicular incident resulting in injury or death, whether or not such harm was intended".

State v. Blackmon, 197 Ariz. Adv. Rep. 10 (1995)
Trial Judge John H. Seidel
Appeal by Spencer D. Heffel, MCPD
Relief Denied

The defendant pled guilty to two counts of attempted sexual assault. At sentencing, the victim (his wife) made an unsworn statement. Defendant was not permitted to cross-examine her. Defendant filed a petition for post-conviction relief, asserting that the Victims' Bill of Rights does not prohibit a defendant from calling the victim to testify at a presentence hearing. The same judge who had refused to allow the cross-examination saw his error, and granted the petition. The state appealed.


The court undertook an examination of whether the Victims' Bill of Rights changed existing law under *State v. Asbury*, 145 Ariz. 381, 701 P.2d 1189 (App. 1984), that a defendant has a due process right to question victims who testify at presentence hearings. The court held that *Asbury* is still good law.

The state argued that the defendant only has a right to cross-examine if the victim is sworn and presents evidence. The court disagreed, and held that *Asbury* applies whether the victim testifies under oath or makes an unsworn statement.

State v. Ray, 197 Ariz. Adv. Rep. 16 (1995)
Trial Judges Lindsay Ellis and Gregory H. Martin
Relief Denied

Defendant was charged in two separate cases with property crimes arising out of a "chop shop" operation, and was found guilty by both juries. Defendant filed Rule 32 petitions in each case, which were denied. The court of appeals granted review to determine whether the warrant issued to search defendant's salvage yards violated the Fourth Amendment, and if so, whether defense counsel was ineffective for failing to challenge the warrant.

The warrant allowed the police to search for: (1) specific property listed in the warrant, (2) any major component vehicle part with a missing or altered VIN number, and (3) any major component part with a VIN,

(cont. on pg. 13) 

which would then be run through an on-site computer for stolen reports.

Noting that the trial court must consider the nature of the property sought to be recovered, the court held that it was not impermissible for the warrant to authorize seizure of categories of items in a "chop shop" operation. The court held that a "chop shop" business typically involves many removable vehicle parts that make it impossible to describe exactly what the police will find when conducting the search.

The court held defendant was therefore unable to show that he was prejudiced in any way by counsel's failure to file a motion to suppress the warrants.

State v. Killean, 197 Ariz. Adv. Rep. 19 (1995)
Trial Judge Gregory H. Martin
Appeal by James H. Kemper, MCPD
Reversed and Remanded

Officers observed defendant at Phoenix Sky Harbor Airport, wearing a business suit, but carrying no briefcase or garment bag (although he did have a suitcase with him). Finding this suspicious, the officers squeezed the suitcase defendant had checked in an attempt to detect an odor in the air pushed out of the bag. The officers smelled nothing but an odor of "hay"; they detained defendant while a sniff dog was brought. The dog alerted on the suitcase, which was found to contain 23 pounds of marijuana.

Defendant was charged with one count of marijuana for sale and one count of transportation of marijuana for sale.

At an informal pretrial conference on the day of trial, defense counsel informed the state, for the first time, that it intended to call three witnesses at trial. During opening arguments, defense counsel argued, again for the first time, that defendant would be denying ownership of the suitcase in which the marijuana was found, and would be submitting documentary evidence to support this claim.

Before the defense portion of the case, the prosecutor moved to preclude the three witnesses and the documents. Defense counsel conceded that the disclosure was untimely, but explained that this occurred because the defendant was living in New York and not present to prepare his defense. The trial court granted the motion and precluded the defense from calling the witnesses and offering the documents. The issues on appeal were whether the trial court erred in: (1) denying the motion to

suppress the contents of the suitcase, and (2) precluding the defendant from offering the evidence and calling his witnesses.

The court of appeals upheld the trial court's ruling on the suppression motion, stating that squeezing the checked bag for an odor did not constitute a search because the defendant's reasonable expectation of privacy --that the contents would not be exposed to view, was not compromised.


The court reversed on the issue of the preclusion of the defense's evidence as a sanction for a discovery violation. The court applied the four-part test enumerated in *State v. (Joe U.) Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984), which are: (1) how vital the evidence is to the case, (2) whether the opposing party will be surprised, (3) whether the discovery violation was motivated by bad faith, and (4) any other relevant circumstances.

Noting the trial court finding that the failure to disclose was caused by defense counsel's negligence, and was not intentional, the court held that a criminal defendant's vital evidence may be precluded as a sanction for a discovery violation **only** where the conduct of defense constitutes bad faith or willful misconduct.

Bird v. State of Arizona, 197 Ariz. Adv. Rep. 28 (1995)
Trial Judge Richard Anderson
Reversed

Defendants Bird and Hollamon took out an advertisement in the *Verde Independent* newspaper in Camp Verde, announcing their bet on the outcome of a pending city council election. They were subsequently charged with a first-ever prosecution under A.R.S. §16-1015, which prohibits betting on the outcome of an election. Defendants moved to dismiss the charges at justice court, arguing that the statute is unconstitutionally vague and overbroad. The JP denied the motion, and the defendants filed a petition for special action. The superior court granted relief, and the state appealed.

The court of appeals reversed, and held that the statute is valid. The court reasoned that the statute is not vague on face, as it clearly prohibits, in understandable language, wagering on the outcome of an election. The court further found that the defendant's **conduct** in placing the bet was not constitutionally protected speech. The court held that the statute punishes the defendants only for the act of making the bet, and not for publicizing

(cont. on pg. 14) 

it by placing the announcement in the newspaper. Finally, the court held that the statute is not overbroad, because it does not infringe on a constitutionally protected right.

State v. Lujan, 197 Ariz. Adv. Rep. 47 (1995)
Trial Judge Susan R. Bolton
Appeal by James H. Kemper, MCPD
Affirmed

Defendant, a seventeen-year-old, was tried in adult court for kidnapping a thirteen-year-old. The defendant grabbed the victim off a bike and took him to a house where others were present, including an acquaintance of the victim. Defendant threatened the victim and detained him for five minutes before others present convinced defendant to let the victim go.

The state alleged that this was a dangerous crime against children in violation of A.R.S. §13-604.01. Following a jury trial, defendant was found guilty and sentenced to the mandatory presumptive term of seventeen years flat. Defendant appeals on the grounds that this was cruel and unusual punishment.

The court of appeals upheld the sentence, ruling that the trial court had no discretion under the applicable statutes to sentence the defendant to anything less than the presumptive term. The court upheld the trial court's analysis that the sentence was not grossly disproportionate to the gravity of the offense.

Judge Kleinschmidt filed a lengthy dissent, stating that "the Arizona kidnapping statute is broadly drawn and when applied in conjunction with the provision relating to crimes against children, it can, at the option of the prosecutor, sweep in and punish relatively innocuous behavior in a brutal way."

Volume 198

Maricopa County Juvenile Action No. JV 510312
198 Ariz. Adv. Rep. 5 (1995)
Judge Colin F. Campbell
Affirmed

The juvenile was charged with theft over \$3,000.00, trafficking in stolen property, and possession of a weapon. The juvenile admitted the weapons charge, and the other charges were dismissed. At disposition, the court considered the dismissed trafficking charge and cited it as being one of its reasons for placing the juvenile on intensive rather than standard probation. When defense

counsel stated that it was unfair to sentence the juvenile as if he were guilty of the class 2 felony of trafficking, the judge told defense counsel, "It's inappropriate for you to minimize his criminal conduct."

The court of appeals found the sentence to be appropriate and not an abuse of discretion citing several policy positions: the court's broad power to make a proper disposition, the purpose of disposition being rehabilitation not punishment, and the need for individualized justice for children.


Furthermore, due to the similarity in procedures between the juvenile and adult sentencing schemes, the court found it appropriate to rely on *Williams v. NY*, 337 U.S. 241 (1945), for the guiding principle that the sentencing court may consider reliable evidence of behavior that has not resulted in a conviction.

Finally, the court cited Rule 26.7(b), Arizona Rules of Criminal Procedure, and ARS 13-702(B) as permitting the sentencing court to consider the type of evidence as was considered here. The court tempered its approval, however, with the caveat that every sentencing and disposition "must be conducted consistent with basic concepts of fairness, justice and impartiality."

State v. Rodriguez
198 Ariz. Adv. Rep. 8 (1995)
Trial Judge J. Kenneth Mangum
Relief Granted

Mr. Rodriguez was convicted by a jury of aggravated DUI (with one prior) and aggravated driving with an alcohol concentration of 0.10 or more. On direct appeal, defense counsel filed a brief and Mr. Rodriguez filed a supplemental brief. While his appeal was pending, Mr. Rodriguez filed a Notice for Post-Conviction Relief pursuant to Rule 32, Arizona Rules of Criminal Procedure, and counsel was appointed. Appointed counsel was unable to find an issue for the Rule 32 petition and therefore filed no petition, but did request an additional 30 days so that Mr. Rodriguez could file a *pro se* petition. The trial court denied the request and then dismissed the "petition" that was never filed. Mr. Rodriguez filed a timely petition for review of the trial court's decision.

The court of appeals found that, although Mr. Rodriguez was convicted by a jury and was able to pursue his constitutional right of review through direct appeal, *Montgomery v. Shelton*, which permits a defendant to file a *pro se* petition under Rule 32 if appointed counsel refuses to do so, was controlling on the

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issue. In *Montgomery*, the Arizona Supreme Court pointed out that occasionally even the most able lawyers fail to see arguable or even winning issues on appeal and that we may not assume that defendants always have competent lawyers. The rationale given for allowing a petitioner to proceed *pro se* is to provide review of what the petitioner personally believes to be his basis for relief.

Finally, the court noted that a defendant who has been convicted after a trial is in the same position as a pleading defendant with respect to certain issues typically litigated through the PCR procedure (e.g. ineffective assistance of counsel claims and newly discovered evidence). Therefore, an extension to file a *pro se* petition should have been granted.

Navajo County Juvenile Action No. JV 91000058

198 Ariz. Adv. Rep. 19 (1995)

Judge Thomas L. Wing

Affirmed

The juvenile was investigated by his Junior High School principal for his involvement in setting a fire inside a school locker. The juvenile first denied involvement but after subsequent questioning by the principal, the juvenile readily admitted setting the fire. The principal testified that the juvenile may have been told that if a law was broken, the police would be called, but the principal did not Mirandize the juvenile or inform him of his rights pursuant to Rule 7(a), Arizona Rules of Procedure for the Juvenile Court. After admitting to setting the fire, the principal called police and the juvenile repeated the admission.

Rule 7(a), the so-called "Juvenile Miranda Warning" need only be given in circumstances where adult Miranda warnings would otherwise be required. The triggering event for Miranda warnings is an in-custody interrogation by state law enforcement agents. However, government employees, such as school principals, if acting as an agent of law enforcement, may be bound by Miranda.

When the court inquired into this principal's conduct, it found that he was not acting as an agent of law enforcement and not at law enforcement's behest. The court specifically found that the principal's intent to report the incident to police did not alone make him an agent of police. The admission therefore was admissible. Additionally, the court found the juvenile's admission to be voluntary as the principal made no threats or promises to the juvenile nor did he use any physical force to coerce the juvenile's admission.

State v. Strayhand

198 Ariz. Adv. Rep. 21 (1995)

Trial Judge Paul A. Katz

Affirmed in part; Reversed in part; Remanded

Facts

Mr. Strayhand was arrested for several armed robberies of fast food restaurants when he fit the general description of the suspect who fled from Mesa Police. Even though a Whataburger employee stated that Strayhand was not the man who held her up earlier that morning, Mr. Strayhand was taken in for questioning.

Mr. Strayhand arrived at the Mesa Police Station at 3:30 a.m. and was left in a holding cell for over nine hours. Although offered food, Mr. Strayhand had not eaten since the previous morning. At 12:45 p.m. Mr. Strayhand was finally taken into an interrogation room, read his rights, and was questioned for over two hours. The detectives took a break, then questioned Strayhand further.

During the first part of the interrogation, Mr. Strayhand denied committing the robberies. The detectives, despite the Whataburger employee's failure to identify Strayhand, told Mr. Strayhand that several people had identified him, including the Whataburger clerk. The detectives went even further and told Strayhand that his lack of cooperation might make things harder on him. Despite Mr. Strayhand's denials and his veiled threat of suicide, the detectives continued to accuse Strayhand of lying and continued telling him that it would only get worse if he did not confess.

Finally, Strayhand stated, "Well, I don't want to answer anymore." Again, the detectives continued questioning Strayhand and telling him that if he cooperated they would tell the county attorney that he'd been cooperative and that he could straighten out his life.

Eventually, the first interrogation ended. Strayhand was returned to the holding cell while the detectives prepared for the initial appearance. After the initial appearance a second interrogation began, apparently initiated by Mr. Strayhand.

During the second interrogation, Mr. Strayhand asked if he should have a lawyer. The detectives told him they could get him one, but Strayhand said he would go ahead and answer their questions. After about 45 minutes, Strayhand confessed to the robberies.

The Confession was the Result of Threats

In examining the totality of the circumstances in order to determine the voluntariness of the confession, the

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court considered the following: the length of time Strayhand was in custody before the interrogation began (12 hours); the length of the first interrogation, during which Strayhand broke down and threatened suicide; the fact that the detectives lied to Strayhand about his fingerprints being found in the vehicle used in the robberies and about being identified by the Whataburger clerk; and, most importantly, the fact that the detectives told Strayhand at least three separate times that being cooperative could only help him and that his cooperation "matters on the amount of time you get."

The court pointed out that so long as any promises made are couched in terms of possibilities, the promise is generally not sufficient to render a confession involuntary. However, the detectives went out of their way to be sure Strayhand understood that if he did not confess, they would make it harder on him.

Once it was established that Strayhand was under coercive pressure to confess, it was necessary to determine if anything had occurred to dispel that coercive pressure. The court considered how much time had elapsed between the application of the constitutionally impermissible pressure and the confession; whether there was any change in the place of interrogation; and whether there was a change in the identity of the interrogators. The court found each of these factors in Strayhand's favor.

In finding the confession to be involuntary, the court reasoned that even though Strayhand had initiated the second interrogation, his will had already been overborne. The fact that Strayhand saw a judge who informed him of his rights meant little because by that point Strayhand had already seen one of those rights--to end questioning--ignored.

Refusal to Stop Questioning when Requested by Defendant Played a Part in Securing his Confession

On at least one occasion during the first interrogation, Strayhand clearly stated that he didn't want to answer anymore. The questioning should have stopped then. Then, on at least two more occasions, Strayhand stated (although less directly) that he wouldn't answer any more questions. Each time, the detectives either ignored his requests or just changed topics and continued questioning.

The court therefore found, pursuant to *Miranda*, "that any statements taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."

Ancillary Issues:

Harmless Error

A constitutional error mandates reversal unless the state proves beyond a reasonable doubt that the error did not contribute to the verdict obtained. The state did not meet that burden.

Defendant was entitled to Mere Presence Instruction

The trial court held that Strayhand could argue mere presence as a defense, but without a charge of accomplice liability, it did not need to instruct on mere presence. The court of appeals held that a defendant is entitled to an instruction on any theory of defense which is recognized by law and supported by the evidence. Therefore, Strayhand should have gotten the mere presence instruction.

Photo Lineup not Unduly Suggestive

The court found that the photo lineup was not unduly suggestive simply because the photo of Strayhand was lighter than the other five. The lighting did not create a substantial likelihood of misidentification by unfairly focusing attention on Strayhand.

Editor's Note: A special thanks to attorneys Karen Clark (Trial Group A) and Christine Israel (Trial Group C) for summarizing Arizona Advance Reports this month. Ω

"The greatest happiness of the greatest number is the foundation of morals and legislation."

~ ~ Jeremy Bentham (1748-1832)

"Let them eat cake."

~ ~ Marie Antoinette (1793)

September Trials

August 22

Ray Schumacher/Mark Potter: Client charged with armed robbery. Investigator H. Jarrett. Trial before Judge Ishikawa ended September 5 with a hung jury. Prosecutor Brown.

August 28

Kristen Curry/Jim Haas: Client charged with two counts of aggravated assault (dangerous). Investigator R. Gissel. Trial before Judge Mangum ended September 7 with a hung jury (7-5 not guilty). Prosecutor McCormick.

Doug Harmon: Client charged with aggravated assault. Trial before Judge Barker ended August 29. Defendant found guilty. Prosecutor Mills.

August 29

Tom Timmer: Client charged with child molestation. Investigator C. Yarbrough. Trial before Judge Skelly ended September 5. Defendant found guilty. Prosecutor Howe.

August 30

Paul Klapper: Client charged with aggravated assault (dangerous) and kidnapping (dangerous). Investigator J. Castro. Trial before Judge Hilliard ended September 7. Defendant found guilty of kidnapping ("dangerous" dropped prior to trial) and guilty of aggravated assault (dangerous). Prosecutor Macias.

September 5

Bob Billar: Client charged with four counts of aggravated assault (dangerous). Trial before Judge Ryan ended September 6. Defendant found guilty. Prosecutor Harris.

Doug Harmon: Client charged with aggravated assault. Trial before Judge Barker ended September 7. Defendant found guilty. Prosecutor Puchek.

Joe Stazzone (advisory counsel): Client charged with sale of narcotic drugs, possession of marijuana, possession of drug paraphernalia. Trial before Judge Bolton ended September 7. Defendant found guilty. Prosecutor Schlittner.

September 11

Dan Carrion: Client charged with aggravated assault on a police officer (dangerous). Investigator A. Velasquez. Trial before Judge Bolton ended September 13. Defendant found **not guilty** of aggravated assault on a police officer (dangerous); guilty of lesser included offense of aggravated assault (dangerous). Prosecutor Whitten.

John Taradash: Client charged with three counts of aggravated assault. Trial before Judge McDougall ended September 14. Defendant found guilty on two counts; **not guilty** on count III. Prosecutor Rea.

Tom Timmer: Client charged with three counts of aggravated DUI. Investigator D. Beever. Trial before Judge Ishikawa ended September 14. Defendant found guilty. Prosecutor Righi.

September 12

Larry Grant/Tennie Martin: Client charged with DUI. Trial before Judge Brown ended September 14. Defendant found guilty. Prosecutor Mann.

James Leonard: Client charged with hindering prosecution. Investigator T. Thomas. Trial before Judge Barker ended September 12. Defendant found guilty. Prosecutor Puchek.

September 18


Tom Timmer: Client charged with aggravated assault. Investigator C. Yarbrough. Trial before Judge Ryan ended September 21. Defendant found guilty. Prosecutor Carlino.

September 19

Rob Corbitt: Client charged with child molestation and sexual conduct with a minor. Investigator V. Dew. Trial before Judge Ishikawa ended September 21. Defendant found guilty. Prosecutor Cook.

Bob Ellig: Client charged with aggravated DUI. Investigator C. Yarbrough. Trial before Judge Hertzberg ended September 26. Defendant found guilty. Prosecutor Righi.

Candace Kent/Michael Gerity: Client charged with aggravated assault, criminal damage and simple assault. Investigator R. Gissel. Trial before Judge Ryan ended September 21. Defendant found guilty of

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aggravated assault; simple assault and criminal damage charges dismissed. Prosecutor Blomo.

Tom Kibler: Client charged with aggravated assault (with two priors and while on parole). Trial before Judge Hendrix ended September 20. Defendant found **not guilty**. Prosecutor Collins.

Jim Wilson/Karen Kaplan: Client charged with aggravated DUI. Trial before Judge D'Angelo ended September 22. Defendant found **not guilty** of aggravated DUI; guilty of driving on a suspended license (misdemeanor). Prosecutor Smith.

September 21

James Leonard: Client charged with aggravated DUI. Trial before Judge Armstrong ended September 25 with a hung jury on count I; guilty on count II. Prosecutor Gann.

September 25

Curtis Beckman (advisory counsel): Client charged with sexual abuse. Investigator D. Erb. Trial before Judge Kaufman ended September 27. Defendant found guilty. Prosecutor Mitchell.

Pauline Houle: Client charged with two counts of possession of narcotic drugs. Investigator D. Erb. Trial before Judge Colosi ended September 27. Defendant found **not guilty**. Prosecutor Kennedy. Ω



Bulletin Board

Personnel

New Attorneys:

Lynn Moore will fill Teri Shaw's juvenile Mesa position when she joins our office the first part of November. Ms. Moore has been employed at the Arizona Attorney General's office for the last six years, most recently handling Child Protective Services cases. Before entering the legal field, she taught in Special Education for ten years.

New Support Staff:

Sid Bradley and **Tom Neus** are our two new investigators. Mr. Neus will join Trial Group A on October 16. Mr. Bradley, who has not been assigned a Trial Group yet, will join our office on October 23. These new investigators replace Howard Jarrett, who retired in September, and Brian Abernethy, who now is working in the Legal Defender's Office.

Carol Johnson and **Patrick Linderman** are the two new Client Services Coordinators for our office. Ms. Johnson, who will join Trial Group B on November 13, was employed as a Sentencing Specialist in the Missouri Public Defender system for three years. Mr. Linderman, who joined Trial Group C on October 23, was a Social Worker for the Alternative Sentencing Project in the New Mexico Public Defender's Office for a year and a half.

Moves/Changes:

Ernesto Quesada, one of our new attorneys and a former law clerk in our Appeals Division, is taking **Mary Ann Twarog's** juvenile Durango position, effective October 23. Ms. Twarog moved to our Mental Health office in mid-October to fill Jodi Weisberg's recently vacated position.

Mary Miller was named our new Mental Health Division Supervisor, following Dick Rice's retirement in June. The appointment was effective on October 23. *Post Script:* Mr. Rice returned in August to serve in a part-time capacity in our Mental Health office.

Paul Prato was selected as the new Appeals Division Supervisor, effective October 23, with **Chuck Krull** designated as the back-up Appeals supervisor for any times that Mr. Prato is absent or unavailable. Mr. Krull additionally was officially named as the coordinator of all Post-Conviction Relief (PCR) activities in Appeals. Ω

Computer Corner

This column is designed to provide simple computer tips helpful to people in the legal field. These tips are fashioned for WordPerfect 5.1 in DOS. If you have any problems, questions or suggestions that you would like to share, please contact Ellen Hudak in Trial Group B (506-8331).

Miscellanea

From Circles to Squares:



●Creating Circles:

To create circles of different dimensions:

Hit **Font Ctrl-F8** and (4) for Base Font. From the Font list, highlight a scalable font and press (1) **Select**. At the **Point size:** prompt, type 80 (*the larger the number, the larger the circle*) and press (Enter). At the document screen, press Compose (**Ctrl-V**), type 4,37 and press (Enter).

To view the circle, press Print (**Shift-F7**) and (6) to View Document, or **Alt-V** (previous Computer Corner). Press Exit (**F7**) when you are done.

●Creating A Subdirectory

To create a sub-directory:

Start with a blank screen.

Hit **List Files (F5)** and **Enter** to bring up your file list.

At the bottom of the screen, you will see several selections.

Pick (7) **Other Directory**.

You will now have the following prompt at the bottom of your screen:

"New Directory=C:\WPMAIN"

Go to the end of the line, type a backslash, type in the name of the directory where you want to create a subdirectory, type another backslash, and type the name of the subdirectory that you would like to create.

For example, you have a directory for attorney "Clooney." You want to add a subdirectory to store all of his special motions for his death penalty cases. After the prompt at the bottom of the screen you would type **\CLOONEY\DEATH** for your new subdirectory. The entire line would read:

New Directory=C:\WPMAIN\CLOONEY\DEATH

Hit **Enter**.

At the bottom of the screen you will see the question,

"Create C:\WPMAIN\CLOONEY\DEATH?"

Type **"Y"** for "Yes."

OR:

Another way to create a sub-directory,
start with a blank screen.

Hit **List Files (F5)**. (DO NOT HIT **Enter** to bring up your file list.)

At the bottom of the screen you will see

Dir C:\WPMAIN*.* (Type = to change default Dir)

Type =.

(cont. on pg. 20)

Computer Corner (cont.)

At the bottom of the screen you will see the prompt

New Directory = C:\WPMAIN

Go to the end of the line, type a backslash, type in the name of your directory where you want to create a subdirectory, type another backslash, and type the name of the subdirectory that you would like to create.

Hit **Enter**. At the bottom of the screen you will see (using the same example as above),

"Create C:\WPMAIN\CLOONEY\DEATH?"

Type "Y" for "Yes."

NOTE: Try not to repeat or recreate a subdirectory already in your files. If you try to create a subdirectory that already exists, you will end up changing your **List Files** default setting to this subdirectory. In other words, whenever you now hit **List Files (F5)**, you will go straight to the subdirectory screen instead of your general WPMAIN files screen (C:\WPMAIN*.*). You normally do not want this.

● Adding or deleting rows in tables:

When you are working on a "table" but are not in "tables" (**Alt-F7**) and you need to add a row, you can do so without returning to "tables" (**Alt-F7**). Simply place your cursor in the spot you want to add the row and hit **Ctrl Insert**. Prompt on bottom left-hand screen will show **Updating Table**. If you want to delete a row, again when you are not in "tables," place your cursor where you want to delete the row and hit **Ctrl Delete**. Prompt in lower left-hand corner will read **Delete Row? No (Yes)**. If you type Y, then a new prompt will be displayed - **Updating table**. Remember if you are deleting a row in this fashion, it will delete everything (any typing) within that row also.

● Searching Codes:

You can search your documents for codes as well as for words. For example, if you want to find a **bold** code, press **Search (F2)**, then **F6** for **Bold**. When you press **Search (F2)** again, your cursor will stop to the right of the first bold code found. You can see the bold code by turning on **Reveal Codes (Alt-F3)**. To find an **Italics** code [**ITALC**], press **Search (F2)**, **Font (Ctrl-F8)**, (2) **Appearance**, (4) **Italc**, then **Search (F2)** again. Your cursor will stop to the right of the first italics code found. NOTE: if you have a macro for italics, do NOT try to use it in the **Search** instruction as it will cause your computer to freeze with a "Please wait" message mocking you in the lower left-hand corner of your screen.

● Changing Default Font Setting:

To change the font setting that your program automatically uses when you start a document (e.g., to change from Courier 10cpi to CG Times (scalable) 12 point):

Hit **Shift-F1** for **Setup**. Select **4** for **Initial Settings**. On the next screen which appears, select **5** for **Initial Codes**. This will take you to a split, blank screen with reveal codes on the bottom part of your screen. Now hit **Ctrl-F8** for **Font**, then select **4** for **Base Font**. When the base font selections appear on your screen, scroll to the font of your choice; when the font is highlighted, hit **Enter**. At the prompt for font size, type in the size (12 is a good, basic font size), and hit **Enter**. Then **Exit (F7)** the **Initial Codes** feature. Now when you start a new document, you will always be in your newly selected font.

● Creating Check Boxes:



To create a temporary macro that will insert check boxes for you, i.e., for a form or a questionnaire:

Hit **Macro Define (Ctrl-F10)** and (**Enter**). With "Macro Define" blinking in the lower left-hand corner of your screen, press **Compose (Ctrl-V)**, hit **4,38** (including the comma) and press (**Enter**). Press **Macro Define (Ctrl-F10)** to end the macro. To use this macro you hit **Shift-F10 (Retrieve)** and (**Enter**).

NOTE: You can change the size of the box by changing the font size (see *Creating Circle above*).